IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

REBECCA A. J.,

Plaintiff,

٧.

Civil Action No. 8:23-CV-1579 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

<u>APPEARANCES</u>: <u>OF COUNSEL</u>:

FOR PLAINTIFF

COLLINS & HASSELER, PLLC 225 State Street Carthage, NY 13619

LAWRENCE D. HASSELER, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
OFFICE OF GENERAL COUNSEL
6401 Security Boulevard
Baltimore, MD 21235

GEOFFREY M. PETERS, ESQ.

DAVID E. PEEBLES U.S. MAGISTRATE JUDGE

<u>ORDER</u>

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security ("Commissioner"), pursuant to 42 U.S.C.

§ 405(g), are cross-motions for judgment on the pleadings. Oral argument was heard in connection with those motions on November 21, 2024, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my

reasoning and addressing the specific issues raised by the plaintiff in this

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

appeal.

- 1) Defendant's motion for judgment on the pleadings is GRANTED.
 - 2) The Commissioner's determination that the plaintiff was not

This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order, once issue has been joined, an action such as this is considered procedurally as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

2

disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

David E. Peebles
U.S. Magistrate Judge

Dated: December 6, 2024

Syracuse, NY

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

-----X

REBECCA ANNE J.,

Plaintiff,

vs. 8:23-CV-1579

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

DECISION

held on November 21, 2024

the HONORABLE DAVID E. PEEBLES, Presiding

APPEARANCES (by telephone)

For Plaintiff: COLLINS & HASSELER, PLLC

225 State Street Carthage, NY 13619

BY: LAWRENCE D. HASSELER, ESQ.

For Defendant: SOCIAL SECURITY ADMINISTRATION

Office of General Counsel

6401 Security Blvd. Baltimore, MD 21235

BY: GEOFFREY M. PETERS, ESQ.

Eileen McDonough, RPR, CRR
Official United States Court Reporter
P.O. Box 7367
Syracuse, New York 13261
(315) 234-8546

THE COURT: The first issue I wanted to address 1 2 before I give you my decision is the question of consent. 3 When this case was initially filed, it was assigned to Magistrate Judge Daniel J. Stewart. The consent form that 4 5 was executed on behalf of the plaintiff on December 18, 2023, and filed, that's docket number 4, consented to the 6 7 jurisdiction of Magistrate Judge Stewart specifically. case was since transferred to me. There was a docket entry 8 9 that required that any consent be withdrawn within I think 10 seven days. That was not done but I wanted to confirm. 11 Attorney Hasseler, on behalf of your client, do you 12 consent to my deciding this case with direct appeal to the 13 Second Circuit Court of Appeals as opposed to issuing a 14 report and recommendation to a district judge? 15 MR. HASSELER: Yes, your Honor, I do. 16 THE COURT: All right. Thank you. 17 Plaintiff has commenced this proceeding pursuant to 18 42, United States Code, Section 405(g) to challenge an 19 adverse determination by the Commissioner of Social Security 20 finding that she was not disabled at the relevant times and 21 therefore ineligible for the disability benefits sought. The 22 background is as follows. 23 Plaintiff was born in January of 1982. 24 currently 42 years of age. She stands 5-foot 2-inches in 25 height, and has weighed at various times between 162 and

1 | 176 pounds.

Plaintiff is divorced. She lives in Ogdensburg with her daughter who was 16 years old on December 1, 2022. Prior to November of 2022 she also lived with her mother and her mother's boyfriend. That's at 1410 of the Administrative Transcript.

Plaintiff has a high school education and attended SUNY Canton for two years. While in school she was in regular classes. At one point she held a CNA, Certified Nurse's Aid, certificate. It may have expired. There is reference that she may also have been a Licensed Practical Nurse.

Plaintiff is right-handed. Plaintiff stopped working in August of 2016. She was apparently fired either for absences, that's at page 44, or not filling out proper paperwork, that's at 41 of the Administrative Transcript. She was a nursing home assistant, an LPN. She has also been a retail cashier at a Stewart's and Family Dollar stores.

Physically, plaintiff suffers from migraine headaches which she has experienced since age 16. She also experiences neck pain, or cervical facet arthropathy, back pain, and polyarthralgia.

Mentally, she suffers from bipolar disorder and generalized anxiety disorder. She apparently attempted suicide in 2014 when she overdosed on a drug. In terms of

treatment, plaintiff has seen for physical general purposes

Physician's Assistant Gabrielle Bentley. She also has seen

Neurologist Awss Zidan and Physician's Assistant Angela Watts

for her headaches at Upstate Medical Center. Mentally, she

sees Dr. Patricia Pielnik every four to six weeks primarily

for medication management, I would assume, and Licensed

Clinical Social Worker Judith Cohen every two weeks.

In terms of activities of daily living, plaintiff is capable of grooming, bathing, dressing. She does some cleaning. She rarely shops. She shops at Walmart when she does. She does not drive or use public transportation. She watches television. She reads. She can manage money. She does not do any cooking or laundry. She walks with her daughter and cares for her daughter. And that appears at 43 to 44, 1412 and 1416 of the Administrative Transcript.

Procedurally, plaintiff applied for Title II benefits on December 4, 2020, alleging an onset date of August 26, 2016. At page 322 her claim of disability is based upon bipolar disorder, social anxiety, general anxiety, depression, low back/lumbar pain with sciatica, neck/cervical pain, migraines, unspecified pain in hands and feet, overweight, and high cholesterol.

A hearing was conducted by Administrative Law Judge Bruce Fein on December 1, 2022, to address plaintiff's claims after they were initially denied at the lower level. On

December 15, 2022 Administrative Law Judge Fein issued an adverse determination. That became a final determination of the Agency on October 31, 2023, when the Social Security Administration Appeals Council denied her application for review. This action was commenced on December 15, 2023 and is timely.

In his decision, ALJ Fein applied the familiar five-step sequential test for determining disability, first noting that plaintiff's last date of insured status was December 31, 2021.

At step one, he concluded that plaintiff had not engaged in substantial gainful activity between the onset date and the date of last insured status.

At step two, he concluded that plaintiff does suffer from severe medically determinable impairments that impose more than minimal limitations on her ability to perform basic work functions, including migraines with cervicogenic headaches, cervical facet arthropathy, bipolar disorder, generalized anxiety disorder, and polyarthralgia.

At step three, he concluded that the plaintiff's conditions do not meet or medically equal any of the listed presumptively disabling conditions set forth in the regulations, specifically considering listings 1.15, 1.16 and 11.02, and with respect to the mental impairments 12.04 and 12.06.

He next concluded based upon the entirety of the record that plaintiff retains the residual functional capacity, or RFC, to perform light work as defined in the

regulations, except as follows:

She can occasionally climb ropes, ladders, or scaffolds, and frequently climb stairs/ramps, balance, stoop, crouch, crawl, and kneel. She needed to avoid concentrated exposure to unprotected heights, hazardous machinery, bright and/or flashing lights, noises at loud or higher levels per the DOT/SCO, and pulmonary irritants such as fumes, odors, gases, dust, and poorly ventilated areas. She could perform work limited to simple, routine, and repetitive tasks. The plaintiff was limited to work with no production rate or pace work involved. She could occasionally interact with co-workers, supervisors, and the public. She could work in a low stress job defined as only occasional decision-making, changes in work setting, and judgment required on the job.

Applying that RFC at step four, ALJ Fein noted that the plaintiff cannot perform her past relevant work that was prior to the date of last insured status and proceeded to step five. With the assistance of testimony from a vocational expert, ALJ Fein noted that the Commissioner bore the burden of proof and found that plaintiff was capable of performing work available in the national economy, not withstanding her limitations as set forth in the RFC, citing

Decision - 23-cv-1579 - 11/21/2024

as representative positions those of packer, mail room clerk, and plastic hospital products assembler, and therefore, concluded that plaintiff was not disabled at the relevant times.

As Attorney Hasseler noted, the Court's function is limited and the standard to be applied is extremely deferential. I must determine whether substantial evidence supports the resulting determination and correct principles were applied. The Second Circuit has noted in *Brault versus Social Security Administration Commissioner*, 683 F.3d 443, from June 29, 2012, that the standard is deferential, even more so than the clearly erroneous standard that we're all familiar with.

The statement made by the Second Circuit concerning that standard is as follows:

"The substantial evidence standard means that when an ALJ finds facts, he can only reject those facts only if a reasonable factfinder would have to conclude otherwise." The standard was more recently reiterated in *Schillo v. Kijakazi*, 31 F.4th 64, Second Circuit, April 6, 2022.

In this case the plaintiff raises several contentions. There was an argument made that at step three the ALJ erred in concluding that plaintiff's conditions do not meet or equal the listed mental conditions specifically focusing on the so-called B criteria. During oral argument

plaintiff withdrew that argument after I pointed out that in a brief to the Commissioner the plaintiff had conceded that her conditions do not meet or medically equal the listed impairments.

The second argument is the failure to consider plaintiff's medically determinable impairments in combination. The focus of that argument is on whether or not she would be off task and/or absent to an extent that would make her unemployable. We confirmed during oral argument that except as pertains to the effect of plaintiff's migraine headaches, she does not challenge the physical component of the RFC, including her ability to perform light work.

The third argument is that the Administrative Law Judge improperly evaluated the opinion evidence in the record. There was also in the main brief some arguments, additional arguments that were not fully developed, including whether or not the subjective complaints of the plaintiff were properly analyzed. There was also an alleged failure to consider plaintiff's depression at step two, and the Social Security Administration Council's failure to consider new evidence submitted that pertained to the period after the ALJ's decision.

The step three argument I will skip because it was withdrawn, although I was otherwise prepared to find that the Commissioner's determination with regard to the B criteria

was supported by substantial evidence, and of course there was no argument that plaintiff's conditions could meet or medically equal the C criteria associated with the mental impairments.

The residual functional capacity determination is challenged in the next argument. The claimant's RFC represents a range of tasks that she is capable of performing notwithstanding her impairments, CFR Section 404.1545(a), and that means her ability, her mental ability to perform sustained work activities in an ordinary setting on a regular, continuing basis, meaning eight hours a day for five days a week or an equivalent schedule. Tankisi versus Commissioner of Social Security, 521 F.App'x 29 at 33, Second Circuit 2013. That RFC is informed by consideration of the claimant's physical and medical ability, symptomatology, and other limitations that could interfere with work activities on a regular and continuing basis, as well as all of the relevant medical and other evidence in the record.

The mental component of the RFC was explained by the Administrative Law Judge at pages 17 to 18 of his decision. He relied on opinions given by consultative examiner Dr. Noia, as well as the prior administrative findings of Drs. Sherer and Bruni. He also relied on treatment notes from treatment providers and plaintiff's activities of daily living. The opinions of Dr. Noia or

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Circuit 2024.

10

1 Dr. Sherer and Dr. Bruni all show and support substantial 2 evidence or provides substantial evidence to support a 3 determination that plaintiff can perform pursuant to a normal schedule. Porteus versus O'Malley, 2024 2180203, Second 4

The determination of Dr. Noia is that plaintiff suffers from only a mild limitation sustaining an ordinary routine and regular attendance at work. That's at 1412. finding of Dr. Sherer, at page 144, is that plaintiff's ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances is, quote, "not significantly limited." Dr. Bruni in his prior administrative medical finding found similarly at page 171.

I agree that plaintiff cites treatment notes that show subjective complaints that could be viewed otherwise, but they do not necessarily dictate a contrary result, unless there is not substantial evidence to support the Commissioner's determination. In the end it is for the Administrative Law Judge to weigh conflicting evidence and, of course, the crux is whether the resulting determination is supported by substantial evidence. The duty of the Administrative Law Judge, and not the Court, to weigh the conflicting medical evidence is well established under Veino v. Barnhart, 312 F.3d 578, Second Circuit 2002.

The real crux here is the evaluation of plaintiff's 1 2 migraine headaches. Clearly they were considered by the 3 Administrative Law Judge and discussed at pages 16 and 17 of the Administrative Transcript. The ALJ noted, as the 4 Commissioner has argued, the significant improvement in the 5 migraine headaches with treatment. Plaintiff testified that 6 7 she was experiencing them approximately one time per week and there were no emergency room visits as a result of the 8 9 migraines. The treatment resulting in improvement is 10 consistent with treatment notes, including at 1247, 1244, 11 1757 of the Administrative Transcript. 12 There are many, many notes and I've reviewed 13 carefully the notes, particularly of plaintiff's neurologist, 14 and there are many, many references to no apparent distress. 15 And also Dr. Lorensen at page 14 to 16 noted that plaintiff 16 did not appear to be in acute distress. Drs. Angelotti and 17 Perrotti, who also rendered prior administrative medical 18 findings, opined that plaintiff can perform light work with 19 limitations to minimize the effect of migraines which were 20 included in the RFC that I read earlier. Those prior 21 administrative findings can provide substantial evidence,

23 *Valdes-Ocasio v. Kijakazi*, 2023 WL 3573761, from May 22,

notwithstanding that they did not examine the plaintiff.

22

24

25

2023. From the Second Circuit Court of Appeals in Woytowicz

v. Commissioner of Social Security, 2016 WL 6427787, from the

Northern District of New York, October 5, 2016. That was a report and recommendation that was adopted at 2016 WL 6426385, Northern District of New York, February 28, 2016.

So I believe that the migraine headaches were properly considered and were the subject of proper limitations set forth in the RFC as described in the prior medical findings.

The next argument concerns the evaluation of the medical opinions of record. Because this case was -- the application in this case was filed after March 27, 2017, the case was subject to the amended regulations regarding the consideration of opinion evidence. Under those regulations the Commissioner will not defer or give any specific evidentiary weight, including controlling weight, to any medical opinions, including those from medical sources, but instead will consider whether those opinions are persuasive by primarily considering whether they are supported by and consistent with the record in the case. 20 CFR Section 404.1520c. The ALJ must articulate how persuasive he finds all of the medical opinions and explain how he considered the supportability and consistency of those opinions.

There are other factors also that may be considered as set out in the regulation, although they're not required to be discussed specifically. In this case again there are conflicting opinions concerning plaintiff's mental status.

There is an opinion from Dr. Y. Sherer, it is from May 17,

2 2021, it's a prior administrative medical finding. It

3 appears at 129 to 150 of the Administrative Transcript. A

4 similar opinion, prior administration finding I should say,

Dr. T. Bruni, January 4, 2022, it's 152 to 178 of the

6 Administrative Transcript, does support the RFC in this case.

And as I said previously, prior administrative medical findings with agency consultants are entitled to strong consideration and can provide substantial evidence if they are supported. The Administrative Law Judge discussed those prior administrative findings at 19 to 20, and explained his reasoning for finding the opinions to be persuasive, and I conclude that he did properly consider those elements of supportability and consistency, and although the explanation is somewhat sparse, it does meet the requirements of the regulations.

There is also an opinion from Dr. Dennis Noia, and that is from April 28, 2021. It's based upon an examination of the plaintiff. It appears at 1410 to 1413 of the Administrative Transcript. It supports the residual functional capacity.

In his medical source statement, Dr. Noia found primarily mild limitations. He did find moderate limitation regulating emotions, controlling behavior, or maintaining well-being, but that does not undermine the RFC in this case.

Decision - 23-cv-1579 - 11/21/2024

I find no error in concluding at page 19, as the
Administrative Law Judge did, that the opinion of Dr. Noia is
persuasive.

There is also an opinion from Physician's Assistant Angela Watts from April 18, 2022, at 1476 to 1479. Clearly it is contrary to the opinions that I cited a moment ago, it's clearly disabling, and opines that plaintiff would be precluded generally from performing even basic work activities and need a break from the workplace, and she would need a break two or three times a week unscheduled, and she would be off task 25 percent or more, and absent more than four days per month, clearly disabling.

The Administrative Law Judge rejected this opinion as outside of the relevant period because it was given on April 18, 2022, four months after -- three and a half months after the date of last insured status, and found that it is not supported by treatment notes, and, thirdly, inconsistent with the record including other opinions and repeated notes of no distress. Interestingly, in the opinion the physician's assistant states that she hasn't seen the plaintiff since August of 2019, yet it looked like they only met on October 22, 2021 and in April of 2022. I find no error in rejecting that opinion.

The difference between that is in Dr. Perrotti's opinion, which was also after the relevant period,

Dr. Perrotti clearly considered plaintiff's condition as it relates to the relevant period. That is clear from 152 of the Administrative Transcript.

There is also an opinion of Licensed Clinical Social Worker Judith Cohen from September 1, 2021. That's at 1453 to 1455. It is again clearly disabling. The Administrative Law Judge considered it at page 20 and found it not to be persuasive and found that it is not supported by treatment notes, which I agree with, which document a few clinical findings, and inconsistent with plaintiff's other findings and activities as noted above. Again, I believe that that's a proper explanation.

There is an opinion from Dr. Patricia Pielnik.

It's dated April 22, 2022. It appears at 1480 to 1482 of the Administrative Transcript. Again, clearly disabling. The Administrative Law Judge considered at page 20 and found it not to be disabling, not to be persuasive. Again, the explanation is sparse but I believe, especially after a searching review of the entire record, that the requirements of the new regulations concerning medical opinions is not reached. He found the opinion not to be persuasive because it is not supported by her treatment notes. Again, I agree with that after reviewing them, which document physical findings, and inconsistent with claimant's other findings and activities noted above.

So, in sum, I believe that the plaintiff is seeking for the Court to weigh the conflicting evidence in a case which as indicated under *Veino* is not a permissible function of the Court. The fact that three sources agree with the plaintiff is not sufficient to compel deference. *Tamara M. versus Saul*, 2021 WL 1198359, Northern District of New York, from March 30, 2021.

The plaintiff has also raised a concern regarding dealing with the handling of plaintiff's subjective complaints. Obviously an Administrative Law Judge must take into account the plaintiff's subjective complaints when rendering the five-step disability analysis, 21 CFR Section 404.1529(a). The Administrative Law Judge, however, is not required to blindly accept the subjective testimony, but instead must proceed to a two-step analysis.

First, assessing whether the claimant's medically determinable impairments could reasonably be expected to produce the alleged symptoms, which the Administrative Law Judge concluded yes in this case.

And secondly, must then evaluate both the intensity and persistence of those symptoms and the extent to which they limit the claimant's ability to perform work-related activities. Social Security Ruling 16-3p. Notably, the ALJ's assessment of subjective reports are considered and entitled to considerable deference by a reviewing court.

Shari L. v. Kijakazi, 2022 WL 561563, Northern District of

New York, February 24, 2022. And Aponte versus Secretary of

Department of Health and Human Services of the United States,

4 728 F.2d 588, Second Circuit, 584.

In this case when read as a whole, I believe the Administrative Law Judge properly explained his reasoning in not finding that the symptoms that were testified to by the plaintiff were as severe as stated. There were nonparty statements that were considered in making this decision, as stated at page 16 of the Administrative Transcript. The Administrative Law Judge considered the medical opinions of record, the treatment records, plaintiff's activities of daily living. I find no error in the assessment of those claims.

In terms of depression, there was an argument made that depression should have been considered as an impairment. At step two, it was plaintiff's burden to establish that the condition imposed significant limitations on her ability to perform basic work activities. Noteworthy is that Dr. Sherer, page 137, Dr. Noia at 1413, did not diagnosis plaintiff as suffering from depression. But in any event, if it was error, it was harmless because he went on to step three and specifically stated that he considered all of plaintiff's impairments even though it was found not to be severe. That's at page 14.

The last argument relates to new evidence. There was evidence presented both to the Social Security

Administration Appeals Council that was from Rochester

Regional Health dated February 7, 2023 to March 23, 2023. It was rejected at page 2 of the Administrative Transcript based upon the finding that it did not relate to the period at issue, and therefore, did not affect the decision about disability prior to beginning on or about December 15, 2022.

The Social Security regulations are specially authorized to submit material evidence to Appeals Council when requesting review. 20 CFR Section 404.970(b). In order to merit review, however, additional evidence must be new, material, and related to the period on or before the date of the hearing decision, and must also present a reasonable probability that such additional evidence would change the outcome of the decision. 20 CFR Section 404.970(a)(5).

In this case I agree that the evidence does not relate to the period at issue, or, in any event, plaintiff failed to elaborate why that determination was erroneous, and more specifically failed to show how it would have provided a reasonable -- presented a reasonable probability that the additional evidence would have changed the outcome of the decision. I have reviewed it. It was largely repetitive of the evidence that was in the record at the time of the decision and does not reveal anything in my view that would

Case 8:23-cv-01579-DEP Document 14 Filed 12/06/24 Page 22 of 23 Decision - 23-cv-1579 - 11/21/2024 alter the equation to a significant degree. So, in sum, I believe that the Administrative Law Judge's decision permits meaningful judicial review, correct legal principles were applied, resulting in a determination supported by substantial evidence. I will grant judgment on the pleadings to the defendant and order dismissal of plaintiff's complaint. Thank you both. I hope you have a good afternoon and a happy Thanksgiving. MR. HASSELER: Thank you, your Honor. MR. PETERS: Thank you, your Honor.

Case 8:23-cv-01579-DEP Document 14 Filed 12/06/24 Page 23 of 23 Decision - 23-cv-1579 - 11/21/2024 CERTIFICATION I, EILEEN MCDONOUGH, RPR, CRR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States. Elsen McDonough EILEEN MCDONOUGH, RPR, CRR Federal Official Court Reporter